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TO: Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

FROM: James Riffin, CEO
The Northern Central Railroad

DATE: November 17, 2004

RE: Petition to Revoke Notice of Exemption, Finance Docket No. 34501.

Dear Secretary Brown:

In ¶5 of Riffin's Answer to Reply of Maryland regarding Riffin's Pennsylvania NOE, Fin. Doc. No. 34501, filed with the Board on October 26, 2004, I mentioned the common law and Maryland's case law grants a riparian landowner the right to repel unlawful waters with a levee. I have enclosed 11 copies and a 3.5" diskette of the Memorandum of Law in Support of Riffin's Motion to Dismiss for Lack of Standing and / or For Failure to State a Cause of Action, which was filed in the Circuit Court of Baltimore County on November 16, 2004. This Memorandum discuses riparian rights in detail.

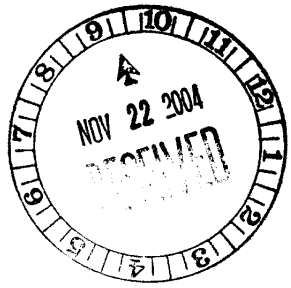
I am forwarding a copy of this Memorandum to the Board for the following reasons: To keep the Board apprised of proceedings in the courts with respect to the railroad facility I am constructing in Cockeysville (which is the underlying reason why Maryland objects so strenuously to my Pennsylvania NOE); to demonstrate the common law and Maryland's case law grant me the right to construct the levee that Maryland objects to so vehemently; and to provide the Board, and those individuals who may be following these proceedings, with a compendium of cases which address the subject of "waters." For those who have an interest in the history of this country, I would suggest reading the older cited cases, particularly the Supreme Court cases, for the cases present a fascinating snapshot of the history of our country. (Did you know Georgia use to extend all the way to the Mississippi River? Or that the states of Illinois and Indiana were created out of land ceded to the U.S. by Virginia?)

Thank you for your assistance.

Sincerely,

James Riffin, CEO
The Northern Central Railroad

A copy of this letter and the attached Memorandum of Law was mailed to Charles A. Spitulnik, counsel for the State of Maryland.



STATE OF MARYLAND DEPARTMENT OF THE ENVIRONMENT	*	**IN THE**
	*	**CIRCUIT COURT FOR**
and	*	**BALTIMORE COUNTY**
BALTIMORE COUNTY, MARYLAND	*	**Case No. 03-C-04-008920**
V.	*	
JAMES RIFFIN, *et. al.*	*	

* * * * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF RIFFIN'S MOTION TO DISMISS FOR LACK OF STANDING AND / OR FOR FAILURE TO STATE A CAUSE OF ACTION

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Diedrich v. Farnsworth, 3 Ariz. App. 264, 413 P.2d 774 (1966) (Can divert stream on own property, so long as return it to natural channel before it leaves your property.)

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McKell v. Spanish Fork City, 6 Utah 2d 92, 305 P.2d 1097 (1957) (Have right to defend against floodwaters.)

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Nunn v. Osborne, 417 P.2d 571 (Okla. 1966) (Lower landowner does not have right to surface waters of upper landowner. Upper landowner can retain surface waters.)

San Pedro, L.A. & S.L. R. Co. v. Simons Brick Co., 187 P. 62 (Calif. 1920) (Stream does not include flood waters.

St. Louis I. M. & S. Ry. Co. v. Walker, 89 Ark. 556, 117 S.W. 534 (1909) (Railroad has duty to provide opening in embankment sufficient to allow natural, not flood, waters.)

Schulze v. Monsanto Co., 782 S.W.2d 419 (Mo. App. 1989) (May build levee, so long as not reckless. OK to put rip rap in stream to prevent bank erosion.)

Spencer v. O'Brien, 158 S.W.2d 445 (Tenn. 1942) (Have right to build levee. Changes unproductive land to productive land. Helps self and public in general.)

State v. Barnes, 171 Kan. 491, 233 P.2d 724 (1951) (State cannot litigate on behalf of individual citizens.)

U.S. v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502 (9th Cir. 1991) (Under federal law stream / river = where vegetation does not grow. If vegetation grows, then land is not a part of the stream / river. Court does not defer to Admin. Ag. determination of law.)

U.S. v. State of Oregon, 295 U.S. 1, 55 S.Ct. 610 (1935) (Title to navigable waters and beds thereof, passed to state when admitted as a state. Navigability = federal question.)

Waring v. Stinchcomb, 141 Md. 569, 119 A. 336 (1922) (Accretion belong to land in front of which it is deposited.)

West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191, 54 A. 982 (1903) (Riparian owner can dam non-navigable stream so long as lower riparian proprietors do not object.)

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MEMORANDUM OF LAW IN SUPPORT OF RIFFIN'S MOTION TO DISMISS FOR LACK OF STANDING AND / OR FOR FAILURE TO STATE A CAUSE OF ACTION

Now comes your Defendant, James Riffin d/b/a The Northern Central Railroad ("Riffin"), who herewith files this Motion to Dismiss for Lack and Standing and / or Failure to State a Cause of Action, and for reasons states:

SYNOPSIS

1. The stream ("Beaver Dam Run" or "Stream") which flows through a portion of Riffin's property located at 10919 York Road, Cockeysville, Maryland ("Cockeysville Railroad Faciltiy"), which property is the subject of this litigation, is a non-navigable stream, which ordinarily conveys stream waters, and occasionally conveys flood and unlawful waters. The Common Law and Maryland's case law grant riparian landowners the right to repel floodwaters and unlawful waters. Plaintiffs have asked this court to issue a mandatory injunction ordering Riffin to remove the levee he has constructed adjacent to Beaver Dam Run, which levee was constructed to repel flood and unlawful waters from flowing onto Riffin's property. Riffin's levee does not obstruct the natural flow of stream waters in Beaver Dam Run, nor does it adversely affect the quality, quantity or natural flow of those stream waters. The Plaintiffs have not alleged they are upper landowners, may not litigate on behalf of individual upper landowners, have not alleged Riffin's levee building activities obstruct the flow of ordinary surface waters from uplands, have not alleged sufficient facts to state a cause of action, or to substantiate that they have standing to object to Riffin's levee building

activities. In addition, Plaintiffs' have not demonstrated Riffin's levee is, or is likely, to cause material irreparable harm to upper landowners, that the balance of hardships is in favor of the Plaintiffs, or that the public interest will be served by the removal of Riffin's levee. Furthermore, Plaintiffs have neither alleged nor demonstrated the common law and Maryland's case law regarding a riparian landowner's right to repel flood or unlawful waters, have been abrogated.

MARYLAND IS A COMMON LAW STATE

2. Article 5 of Maryland's Constitution states: "That the inhabitants of Maryland are entitled to the Common Law of England ... according to the course of that law ... as existed on the Fourth day of July, 1776." Maryland has adopted the common law of England, *en masse*, as it existed in England on July 4, 1776, and as it prevailed in Maryland either practically or potentially. *State v. Brown*, 21 Md. App. 91, 92, 318 A.2d 257, 258 (1974). "The common law, however, is subject to the control and modification of the legislature, and may be abrogated or changed as the General Assembly may think most conducive to the general welfare." *State v. Canova*, 278 Md. 483, 486, 365 A.2d 988, 990 (1976). "The determination of the nature of the common law as it existed in England in 1776, and as it then prevailed in Maryland either practically or potentially, and the determination of what part of that common law is consistent with the spirit of Maryland's Constitution and her political institutions, are to be made by [Maryland's Court of Appeals.]" *Ireland v. State*, 310 Md. 328, 331, 529 A.2d 365, 366 (1987).

3. "It has been said that statutes are not presumed to make any alterations in the common law further than is expressly declared, and that a statute, made in the affirmative without any negative expressed or implied, does not take away the common law. The rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language. In order to hold that a statute has abrogated common law rights existing at the date of its enactment, it must clearly appear that they are repugnant to the act, or the part thereof invoked, that their survival would in effect deprive it of its efficacy and render its provisions nugatory." *Lutz v. State*, 167 Md. 12, 15, 172 A. 354, 356 (1934) (quoting 25 R.C.L. 1054). Quoted in *Robinson v. State*, 353 Md. 683, 693, 728 A.2d 698, 702 (1999).

4. None of the statutes relied upon by Plaintiffs (§§5-503, 4-103, 4-105(a), 4-413, 9-322, and

9-323, Md Environment Article and §33-5-104(a) Baltimore County Code) have express language which state they abrogate, supercede, or modify the common law or Maryland's case law regarding riparian rights. Consequently, these statutes do not take away the common law regarding riparian rights. The focus of all of these statutes is on maintaining the quality of stream waters, rather than control of flood or unlawful waters. In the instant case, Plaintiffs have not prooffered any facts which would indicate Riffin's levee building activities have obstructed, or adversely affected the quality, quantity or natural flow, of Beaver Dam Run's stream waters.

5. The common law, Federal law and case law categorize waters as either navigable or non-navigable. Non-navigable waters are further classified as either percolating, surface, stream, flood or contained waters. There is a unique body of law which is applicable to each type of water. To determine which body of law is applicable, one first must categorize the type of water being studied.

NAVIGABLE WATERS

6. Whether waters are navigable or non-navigable, is a federal question. *The Daniel Ball v. United States*, 10 Wall. 557, 563, 19 L.Ed. 999, 1001 (1871); *United States v. State of Utah*, 283 U.S. 64, 75, 51 S. Ct. 438, 441 (1931); *State of Utah v. United States*, 403 U.S. 9, 10, 91 S. Ct. 1775, 1776 (1971).

> "The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all as to the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide-water and navigable water there signify substantially the same thing. But in this country, the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide-water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. (Citation omitted.) A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the

navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

... And by its [Grand River's] junction with the lake [Lake Michigan] it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in Gilman v. Phila. 3 Wall. 724, 18 L. ed. 99, "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress." *The Daniel Ball,* 10 Wall. at 563-564, 19 L. Ed. at 1001.

The determining criteria is whether the watercourse is capable of being used "in their *ordinary condition* as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (Emphasis added.) *The Daniel Ball, supra,* 10 Wall at 563, 19 L.Ed. at 1001; *United States v. State of Utah*, 283 U.S.at 76, 51 S. Ct. at 441; *State of Utah v. United States*, 403 U.S. at 10, 91 S. Ct. at 1776.

7. In *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 698, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899), the Supreme Court said:

> "The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river."

THE OUTER LIMITS OF A RIVER OR STREAM IS DENOTED BY ITS "HIGH WATER MARK" UNDER "ORDINARY CONDITIONS."

8. In *United States v. Rands*, 389 U.S. 121, 123, 88 S.Ct. 265, 267, 19 L.Ed. 2d 329 (1967),

the Supreme Court said:

> "The navigational servitude of the United States does not extend beyond the high-water mark."

9. In *Howard v. Ingersol,* 54 U.S. (13 How.) 409, 415, 14 L.Ed. 189, 204 (1851), the Supreme Court said:

> "When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow; and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water; and a bed; and that the outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. ... It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water."

10. In *U.S. v. Harrell,* 926 F.2d 1036, 1040 (11th Cir. 1991), that court said:

> "It also is clear that the government's navigational servitude *cannot* extend *over* the bed of an inland body of water. *Goose Creek Hunting Club, Inc. v. United States,* 518 F.2d 579, 583, 207 Ct. Cl. 323 (1975); Nor does a river's ordinary high water mark encompass the river's peak flow or flood states. *Oklahoma v. Texas,* 260 U.S. 606, 632, 43 S.Ct. 221, 224, 67 L.Ed. 428 (1923)." (Emphasis in original.)

At 1041 - 1042, the *Harrell* court went on to say:

> "The meaning of "ordinary high water mark," however, must be read within the definitional limits set forth by the federal courts. The Supreme Court has held that the 'bed" of a navigable river does not include land covered by the "extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." *U.S. v. Chicago, Milwaukee, St. Paul and Pacific Railroad,* 312 U.S. 592, 596, 61 S.Ct. 772, 775, 85 L.Ed. 1064 (1941); *see also United States v. Claridge,* 416 F.2d 933, 934 (9th Cir. 1970) (ordinary high water mark does not extend to peak flow or flood stage so as to include overflow on flood plain)." Neither does the bed of the river include the "lateral valleys which have the characteristics of relatively fast land, and usually are covered by upland

grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood. *Oklahoma v. Texas, supra.* Other expressions of the concept of "ordinary high water mark" have been summarized by the court in *United States v. Cameron, 466 F.Supp. 1099, 1111* (M.D. Fla. 1978):

> The ordinary high water line has, for example, been defined as the line where the water stands sufficiently long to destroy vegetation below it. *Goose Creek Hunting Club, Inc. v. United States, supra* at 583; *Kelley's Creek and Northwestern R.R. v. United States,* 100 Ct. Cl. 396, 406 (1943).
>
> It has also been said to be the line which diverts [sic] upland from the river bed, the river bed being the "land upon which the action of the water has been so constant as to destroy vegetation." *United States v. Chicago B & Q R. Co.,* 90 F.2d 161, 170 (7th Cir. 1937). Another Court has defined the mark as "a natural physical characteristic placed upon the lands by the action of the river." *U.S. v. Claridge,* 279 F.Supp. 87 (D. Ariz. 1966), *aff'd,* 416 F.2d 933 (9th Cir.), *cert. denied,* 397 U.S. 961, 90 S.Ct. 994, 25 L.Ed.2d 253 (1969). The Court in *Harrison v. Fite,* 148 F. 781 (8th Cir. 1906), defined the ordinary high water line as the line below which the soil is so usually covered by water that it is wrested from vegetation and its value for agricultural purposes destroyed. The Third Circuit similarly defined the term as the line below which the waters have so visibly asserted their dominion that terrestrial plant life ceases to grow and, therefore, the value for agricultural purposes is destroyed. *See Borough of Ford City v. United States,* 345 F.2d 645, 648 (3d Cir.), *cert. denied,* 382 U.S. 902, 86 S.Ct. 236, 15 L.Ed.2d 156 (1965).
>
> In reaching this conclusion, we acknowledge that the ordinary high water mark of non-tidal rivers is not the elevation *reached* by flood waters; rather, it is "the line to which *high* water *ordinarily* reaches." (Citation omitted.) Thus, what courts have been interested in is evidence, such as a change in terrestrial vegetation, indicating the relatively permanent elevation of the water. (Citations omitted.) Debris and litter left from temporary and unpredictable floodwaters, unlike that left from ordinary high water, is not evidence of the river's ordinary high water mark." (Emphasis in original.)

11. Since Beaver Dam Run is not susceptible of being used in its ordinary condition, as a highway of commerce, **it is a non-navigable stream.**

PERCOLATING, SURFACE, CONTAINED, STREAM, FLOOD, AND UNLAWFUL WATERS

12. In *Finley v. Teeter Stone, Inc.,* 251 Md. 428, 432, 248 A.2d 106 (1968), that court defined **percolating waters** to be those "which ooze, seep or filter through soil beneath the surface, without a

defined channel, or in a course that is unknown and not discoverable from surface indications."

13. **Surface waters.** Riffin could not find a Maryland case where the term "surface waters" was defined. California's supreme court defined "surface waters" as follows:

> "Surface waters are those falling upon, arising from, and naturally spreading over lands produced by rainfall, melting snow, or springs. They continued to be surface waters until, in obedience to the laws of gravity, they percolate through the ground or flow vagrantly over the surface of the land into well defined watercourses or streams. (Citations omitted.) After they have been gathered into a natural channel, however, they become stream waters. (Citations omitted.) *Everett v. Davis,* 18 Cal. 2d 389, 115 P.2d 821, 823 (1941).

14. This definition of surface waters has been adopted by Arizona [*Kirkpatrick v. Butler,* 14 Ariz. App. 377, 483 P.2d 790, 794 (1971)]; Arkansas [*Ebbing v. State Farm Fire & Cas. Co.*, 67 Ark. App. 381, 1 S.W. 3d 459 (Ark. App. 1999)]; Indiana [*Capes v. Barger,* 123 Ind. App. 212, 109 N.E. 2d 725, 726 (1953)]; Michigan [*Fenmode, Inc. v. Aetna Casualty & Surety Co. of Hartford, Conn.*, 303 Mich. 188, 6 N.W.2d 479, 481 (1942)]; Minnesota [*Enderson v. Kelehan,* 226 Minn. 163, 32 N.W.2d 286, 288-289 (1948)]; Nebraska [*Georgetown Square v. U.S. Fidelity & Guar.*, 3 Neb. App. 49, 523 N.W.2d 380, 384-385 (Neb. App. 1994)]; Texas [*Raburn v. KJI Bluechip Investments,* 2001 WL 721040 (Tex. App. Fort Worth 2001)]; Washington [*Currens v. Sleek,* 138 Wash. 2d 858, 983 P.2d 626, 628 (1999)]; Wisconsin [*Thomson v. Public Service Commission,* 241 Wis. 243, 5 N.W.2d 769, 771 (1942)].

15. "Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basis from which they normally disappear through evaporation or percolation." *Georgetown Square, op. cit.* at 385. "Such waters are lost by percolation, evaporation or by reaching some definite watercourse or substantial body of water in which they are accustomed to and do flow with other waters." *Fenmode v. Aetna Casualty & Surety Co., op. cit.* at 481. "After they have been gathered into a natural channel, however, they become stream waters." *Everett v. Davis, op. cit.* at 823. "They do not lose their character as surface waters merely because in a measure they are absorbed by or soak into the marshy or boggy ground where collected." *Enderson v. Kelehan, op.*

cit. at 289. Surface waters do not become a watercourse by being gathered into an artificial ditch and fed away, *Case v. Hoffman,* 100 Wis. 314, 72 N.W. 390 (1897). Rainwater and snow melt which flow off a roof are surface waters. *Georgetown Square, op. cit.* at 386.

16. Surface waters "do not include those which have once become a part of a stream" *Everett v. Davis, op. cit.* at 823. Stream waters continue to be stream waters, and do not revert back to surface waters, when they diffuse out over an alluvial cone, and cease to be confined in a channel. *Everett v. Davis, Id.* at 826. Flood waters "spreading from the channels of the stream over the adjacent country and accompanying the channel waters in a parallel course to the sea, are flood waters and are subject to the doctrine of flood and not surface waters ... ." *Weinberg Co. v. Bixby,* 185 Ca. 87, 196 P. 25, 29-30 (1921).

17. **Contained waters.** Surface waters lose their character as surface waters, and become contained waters, when they are diverted or channeled by an artificial force or manmade device, which prevents *natural* drainage. Contained waters are those waters contained in gutters, down spouts and drain pipes, *Georgetown Square, op. cit.* at 386, a man-made trench, *Heller v. Fire Ins. Exchange,* 800 P.2d 1006, 1009 (Colo. 1990), enter into subsurface air conditioning and heating ducts, *Transamerica Insurance Company v. Raffkind,* 521 S.W.2d 935 (Tex. Civ. App. 1975), or burst from a broken water main, *Ebbing v. State Farm Fire & Cas. Co., op. cit.* at 462.

> "When rainfall is under control, either by ditches, tanks, ponds, or pipes, it no longer is considered surface water. The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water, distinguishing it from water flowing in a natural watercourse." *Dalon v. City of DeSoto,* 852 S.W.2d 530, 538 (Tex. App. Dallas 1992), writ denied, (Apr. 21, 1993).

18. **Stream waters.** In *Wash. Water Co. v. Garver,* 91 Md. 398, 408, 46 A. 979 (1900), that court adopted the following definition for a stream:

> "A steam of water usually flowing in a definite channel, having a bed, sides or banks, and usually discharging itself into some other stream or body of water. To constitute a water-course, the size of the stream is not important; it might be very small and the flow of water need not be constant. But it must be something more than a mere surface drainage over the entire face of a tract of land."

19. If waters flow in a channel underground, and are not filtered as they flow in that channel, then they are considered to be stream waters flowing in a watercourse. *Id.* at 408.

20. "... [S]urface water becomes a natural water course at the point where it begins to form a reasonably well-defined channel, with bed and banks or sides and current, although the stream itself may be very small, and the water may not flow continuously." *City Dairy Co. v. Scott,* 129 Md. 548, 552, 100 A. 295 (1917).

21. **Natural watercourse.** Drainage flows naturally when it follows "the natural slope of the land ... ." *Id.* at 553. Maryland has adopted the common law maxim regarding water courses: *Aqua currit et debet currere, ut currere solebat.* (Water runs, and ought to run, as it has used to run.) *Baer v. Board of County Com'rs of Washington Co.,* 255 Md. 163, 167, 257 A.2d 201, 203 (1969).

22. An upper landowner "has no right to discharge water into an artificial channel or in a different manner than the usual and ordinary natural course of drainage, or put upon the lower land water which would not have flowed there if the natural drainage conditions had not been disturbed. *Biberman v. Funkhouser,* 190 Md. 424, 429, 58 A.2d 668, 671 (1948); *Neubauer v. Overlea Realty Co.,* 142 Md. 87, 99, 120 A. 69, 73 (1923); *Hancock v. Stull,* 206 Md. 117, 119, 110 A.2d 522, 523 (1955); *County Commissioners of Baltimore County v. Hunter,* 207 Md 171, 180,113 A.2d 910, 913-914 (1955); *Mark Downs, Inc. v. McCormick Properties, Inc.,* 51 Md. App. 171, 183, 186, 441 A.2d 1119, 1126, 1128 (1982).

23. **Flood waters.** Riffin could not find any Maryland cases which define the term, 'Flood waters." In *Lukrich v. Rodgers,* 1 Cal. Rptr. 30, 34 (1959), that court stated:

> "The term 'flood waters' is used to indicate waters which escape from a watercourse in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not affect their character as flood waters or give to the course which they follow the character of a natural watercourse."

24. Waters are characterized as flood waters when they "break away from the confines of the

natural channel," *Kennecott Copper Corp. v. McDowell,* 100 Ariz. 276, 413 P.2d 749, 752 (1966), "because of their height," *Thompson v. La Fetra,* 180 Cal. 771, 183 P. 152; *Everett v. Davis, op. cit.* at 823. "Implicit in the definition of flood waters is the element of abnormality; they are flood waters because of their escape from the usual channels under conditions which do not ordinarily occur." *Everett v. Davis, op. cit.* at 823.

25. **Unlawful waters.** Unlawful waters have been defined to be those which result from "the diversion of the drainage from its natural course," *City Dairy Co. v. Scott,* 129 Md 548, 553, 100 A. 295 (1917). The following have been held to be unlawful waters: Waters concentrated or channelized, *Baer v. Board of County Com'rs of Wash. Co., op. cit.* at 169-171, waters discharged into an artificial channel or in a different manner than the usual and ordinary natural course of drainage, *Biberman v. Funkhouser, op. cit.* at 429, *County Commissioners of Baltimore County v. Hunter, op. cit.* at 180, *Hancock v. Stull, op. cit.* at 119, or put upon the lower land due to disturbance of natural drainage conditions, *Neubauer v. Overlea Realty Co., op. cit.* at 98, *Kennedy-Chamberlin Development Co. v. Snure,* 212 Md. 369, 376, 129 A.2d 142, 146 (1957), and an increase in the volume of water due to removal of all ground cover on upper lands, *Battisto v. Perkins,* 210 Md. 542, 546, 124 A.2d 288, 290 (1956).

26. The watershed for Beaver Dam Run encompasses thousands of acres of intensely developed land. (All of the apartments and houses adjacent to Cranbrook Road in Cockeysville, from Warren Road to Padonia Road. All of the Hunt Valley business park, from Oregon Ridge, to Shawan Road, to York Road, to Warren Road.) This entire watershed has been extensively graded then covered with impervious surfaces (roofs, roads, parking lots), thereby changing the natural ground cover and natural drainage. Surface waters from this watershed have been concentrated, then channelized into storm drains (artificial channels), which empty into Beaver Dam Run. During rainfall events, these surface waters rapidly converge on Beaver Dam Run, materially increasing the volume of the stream waters flowing in Beaver Dam Run, often to the point where these excessive, unlawful waters overflow the banks of Beaver Dam Run, and flood Riffin's Cockeysville Railroad Facility.

RIPARIAN RIGHTS

27. Riffin was unable to find a Maryland case which specifically addressed the issue of whether Maryland does, or does not, have an ownership interest in non-navigable waters. The common law and case law have held a riparian land owner owns the banks and bed of a non-navigable stream, to the middle, or thread, of the stream, even without express language. *Linthicum v. Shipley,* 140 Md. 96, 99, 116 A. 871, 872 (1922); *Hardin v. Jordan,* 140 U.S. 371, 11 S.Ct. 808, 812 (1891). In the instant case, Riffin's deed (a copy of which is attached as an exhibit), expressly states his property extends to the middle of Beaver Dam Run from the intersection of York Road and Beaver Dam Run, east for approximately 154 feet east of York Road, then includes both banks of Beaver Dam Run from that point to a point near Beaver Run Lane.

28. In *U.S. v. Harrell, op. cit.* at 1044, that court stated: "Simply stated, the state does not own non-navigable waters, and the public has no right of access." In *Medlock v. Galbreath,* 187 S.W.2d 545, 546 (1945), the supreme court of Arkansas stated: "the owners of a part of the bed of the stream, have a right to control that part of the surface of the water of said stream that lies above the bed of the stream owned by them." In *Wehby v. Turpin,* 710 So.2d 1243, 1249 (1998), after an extensive review of surface-water rights above non-navigable streams in Arkansas, Florida, Georgia, Illinois, Indiana, Mississippi, New Jersey, New York, Pennsylvania, Texas, Virginia, and W. Virginia, the Supreme Court of Alabama concluded the common law grants a riparian owner of non-navigable waters, the exclusive right to use the surface of the water over that portion of the bed of the non-navigable waters, which the riparian owner has title to, and may exclude others from utilizing the surface of those waters.

29. Maryland's courts have held stream waters belong to all of the riparian owners along that stream, in common, and all have a right to a reasonable use of those waters. As was stated in *Baltimore v. Appold,* 42 Md. 442, 456 (1875):

> "The right of every riparian owner to the enjoyment of a stream of running water in its natural state, in flow, quantity and quality, is too well established to require the citation of authorities. It is a right incident and appurtenant to the ownership of the land itself, and being a *common right*, it follows that every proprietor is bound so to use *the common right* as not to interfere with an *equally beneficial enjoyment of it by others.* This is the necessary result of the quality of right among all the proprietors of that which is common to all." (Emphasis in original.) See also: *Gladfelter v. Walker,* 40 Md. 1, 13 (1874); *Jessup & Moore Paper Co. v.*

Zeitler, 180 Md 395, 397, 24 A.2d 788, 790 (1942).

30. Maryland statutory law defines "waters of the state," as including both stream waters and those flood waters that would result from a 100-year rain event. In *Bausch & Lomb v. Utica Mutual,* 330 Md. 758, 786-787, 625 A.2d 1021, 1035 (1993), the court said the phrases, "waters of the State" or "State waters" "are simply generic usage addressing the location of waters within State borders ... ." "The term "waters of the State" has no significance with respect to the proprietary ownership of such waters."

31. Maryland's case law has held upper landowners may develop their properties, so long as they do not change the natural drainage conditions, do not discharge their surface water into an artificial channel, or in a different manner than the usual and ordinary natural course of drainage, or put upon the lower landowner water which would not have flowed there if the natural drainage conditions had not been disturbed, and so long as they take steps to mitigate the consequences of their earth-disturbing activities. See the cases cited in ¶ 22, *supra.*

32. Maryland's case law has held a lower landowner may not obstruct the *natural* flow of **surface** waters from an upper landowner's property. If a lower landowner unlawfully obstructs the *natural* flow of **surface** waters from an upper landowner's property, that upper landowner may file suit against the lower landowner requesting damages and may request a court enjoin the lower landowner from obstructing the *natural* flow of **surface** water from the upper landowner's property. See the cases cited in ¶ ¶21, 22, 25, *supra.*

33. Maryland's case law has held in the event one or more upper landowners engage in earth-disturbing activities which result in increased flow of water over a lower landowner's property, that lower landowner may file suit against the upper landowner(s) for damages, may ask a court to enjoin the upper landowner's unlawful acts, **and may repel with levees or fill material, waters unlawfully placed upon the lower landowner's property.** See the cases cited in ¶ 25, *supra.*

34. Riffin was unable to find a Maryland case which addresses the issue of whether *flood* waters in Maryland are considered to be a common enemy which all riparian proprietors are entitled to ward off. (As discussed in ¶25 *supra*, Maryland's Court of Appeals has ruled lower landowners

may repel *unlawful* waters.) In *Weinberg Co. v. Bixby,* 185 Cal. 87, 196 P. 25, 29 (1921), the Supreme Court of California, after an extensive review of the subject, made the following comments:

> "The doctrine of the common law relating to protection against flood overflow of rivers, and which has been adopted by the California courts, recognizes such flood waters as a common enemy which may be guarded against or warded off by one whose property is invaded or threatened, by obstructions which are merely defensive in their nature and not calculated to interfere with the current of the water in its natural channel.
>
> The rule as stated in Rex v. Commissioners, 8 B&C 355, and which has been often quoted with approval by this court, declares that the sea "is a common enemy," and that any proprietor of land exposed to the inroads of the sea may protect himself by erecting a groyne or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like, and that "each landowner for himself *** may erect such defenses for the land under his care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy." Bailey, J., concurring in this opinion, says:
>
> > "I am entirely of the same opinion. It seems to me that every landowner exposed to the inroads of the sea has the right to protect himself and is justified in making and erecting such works as are necessary for that purpose."
>
> Commenting on the rule established by the decisions just cited, the principle is thus tersely stated in Jones v. California Development Co., 173 Cal. 565, 574, 160 Pac. 823, 827 (L.R.A. 1917C, 1021):
>
> > "The underlying principle governing the decision of all these cases which deal with extraordinary water conditions, whether created by the ocean or by unexpected and unprecedented floods, is that in such stress the landowner may use every reasonable precaution to avert injury from his land, and whether or not his conduct be reasonable will be determined by existing conditions and not by after consequences; so that if the acts of the landowner be, in light of the existing circumstances, not unreasonable, he will not be held liable for consequent damages which by these reasonable acts may be inflicted upon another landowner."
>
> We recognize the limitation in all of these cases that such right of self-protection does not permit of any obstruction of or interference with the natural channel of the stream or diversion of the flow of the water in such channel."

RIFFIN'S LEVEE

35. As discussed *supra*, the common law and Maryland's case law grant a riparian proprietor such as Riffin, the right to repel unlawful waters with a levee, so long as the levee does not obstruct the *natural* flow of *stream* waters, does not unreasonably obstruct the *natural* flow of *surface* waters from upper lands, and does not unreasonably alter the *natural* flow, quantity or quality of stream waters flowing past lower riparian landowners. Maryland's appellate courts have not indicated whether flood waters are to be treated as a common enemy, nor have they indicated whether one has the right to repel flood waters onto an adjacent landowner's or upper landowner's property with impunity.

36. The courts in other states have found that if a riparian owner owns both sides of a creek (as Riffin does), he has the right to erect a levee on one side of the creek, because it interferes with nobody but himself. *Burwell v. Hobson,* 12 Gratt 322, 65 Am Dec 247 (Va. 1885). Likewise it was held that if one's levee had the practical result of an "unsubstantial, trivial, or unimportant" affect on another riparian owner's property, this affect would be *de minimis*, and not actionable. *Knight v. Durham,* 136 S.W. 591 (1911 Tex Civ App). And in *Way v. Roddy,* 140 SW 1148 (1911 Tex Civ App), that court found that the effect of the defendant's levee "would be to deepen the water on the plaintiff's land not to exceed 6 inches in the highest flood, which would not materially injure the land," and thus was *de minimis* and not actionable.

37. Riffin's levee does not obstruct the natural flow of the stream waters in Beaver Dam Run, does not have a material affect on the level of flood waters on other riparian lands, and does not affect the natural quality, quantity or flow of Beaver Dam Run's stream waters as they flow past lower riparian lands. Riffin's levee also does not obstruct the flow of natural surface waters from upper lands. In short, Riffin's levee is not causing, nor will it cause a material injury to upper landowners, or to other riparian landowners.

38. As stated in *City Dairy Co. v. Scott, op. cit.* (1917) at 553:

> "The diversion of the drainage from its natural course to the land of the defendant was, therefore, an unlawful invasion of its property, which it had the right to resist." At 555, the court went on to say: "It is said in 3 *Farnham on Water, etc.*, p. 2576, that the proprietor upon whose land water is unlawfully thrown may erect barriers against it, and in the case of *Wills v. Babb,* 78 N.E. 42, 6 L.R.A. (N.S.), 136, the Supreme Court of Illinois said: ... that

they may lawfully erect such barriers ... as may be necessary to protect said lands from such overflow, or, in other words, that they may lawfully repel from their lands, by proper levees, the waters ... which have been wrongfully cast upon their lands." After citing a number of cases, the Court quotes the statement in *Kauffman v. Griesemer*, 26 Pa. 407: "The plaintiffs had no right to insist upon his (the defendant's) receiving waters which nature never appointed to flow there, and against any contrivance to reverse the order of nature he might peaceably and on his own land take measures of protection. * * * The only servitude the plaintiffs could claim in the defendant's land was that it should receive the overflow which was natural and customary."

The court then held that it was lawful for City Dairy Co. to fill its property in order to repel the unlawful waters that had been cast on its land.

39. In *Biberman v. Funkhouser, op. cit.* (1948) at 429, the court cited with approval its holding in City Dairy Co., and reiterated that "If water is unlawfully forced on the lower owner he is entitled to fill his property to protect it from the unlawful flow of the water." And again in *Hancock v. Stull, op. cit.* (Jan. 1955) at 119, the court repeated its holding in *Biberman* that "If water is unlawfully forced on the lower owner, he is entitled to protect his property from the unwarranted flow." And in May, 1955, in *County Commissioners of Baltimore County v. Hunter, op. cit.* at 180, the court once again reiterated its holding that "If water is unlawfully forced on the lower owner, he is entitled to protect his property from the unwarranted flow." Riffin was unable to locate any more recent Maryland cases where the issue of repelling unlawful waters was presented. (In *Mark Downs, Inc. v. McCormick Properties, op. cit.* at 183-184 (1982) the court did quote with approval the holdings in *Biberman*, *Hancock*, and *County Commissioners of Baltimore County, op. cit.*).

40. In the *Mark Downs,* case at 188, the court rejected the defendants' argument that the flood waters caused by their grading and paving activities, were an 'Act of God,' for which they were not liable. The court stated: "Where God and man collaborate in causing flood damage, man must pay at least for his share of the blame." (The *Mark Downs* case involved flood waters emanating from Beaver Dam Run immediately downstream from where Riffin has constructed his levee.)

PLAINTIFFS PRAYER FOR INJUNCTIVE RELIEF
PLAINTIFFS FAILURE TO STATE A CAUSE OF ACTION AND / OR
LACK OF STANDING

41. Plaintiffs have asked this court to compel him to remove his levee. To prevail, Plaintiffs must establish that they have standing and that Riffin's levee is causing (or at least may cause) irreparable harm to Plaintiffs, that the balance of hardships is in favor of Plaintiffs, and that removing Riffin's levee would be in the public interest.

42. **Standing.** Plaintiffs have not alleged they are upper landowners, who have a right to the uninterrupted natural flow of stream waters down Beaver Dam Run, have not established that the stream waters or flood waters of Beaver Dam Run are lawful waters, have not established that Riffin's levee obstructs the natural flow of Beaver Dam Run's stream waters, or adversely affects the natural quality, quantity or natural flow of those steam waters. Plaintiffs have not demonstrated that their regulations abrogate, supercede or modify the common law or Maryland's case law regarding flood or unlawful waters. In short, Plaintiffs have not established they have standing to bring their suit, for they have not established Riffin's levee has caused, or may cause, an injury to their (or the public's) riparian or upperland owner's rights.

43. **Cause of action, irreparable harm.** Plaintiffs have failed to establish Riffin's levee is causing, or will cause, irreparable harm to the natural flow of Beaver Dam Run's stream waters, nor have they documented that in repelling the unlawful waters being cast upon Riffin's property, they or the public will suffer any material, irreparable harm. At most, there may be a *de minimis* increase in the level of the floodwaters on Riffin's property on the opposite side of Beaver Dam Run (which does no harm to the public), and perhaps a slight increase (mathematically, there would be no increase) in the level of the flood waters at the western boundary of Riffin's property. [Riffin has placed approximately 1,000 cubic yards of fill on his property. (9,000 sf by an average depth of 3 ft = 1,000 cubic yards.) During the last flood (hurricane Ivan, September 28, 2004), the surface of Beaver Dam Run was approximately 150 feet wide. 350 feet of Beaver Dam Run fronts on the south side of Riffin's property. The normal water surface of Beaver Dam Run drops 1.1 feet over this 350 feet of stream (measured November 16, 2004; see the attached Affidavit of Riffin.). If the water surface of Beaver Dam Run were to be raised 1.1 feet at a point 350 feet east of Riffin's western boundary line, the water surface would be level along this 350 feet of stream frontage. The volume of this triangular wedge would be 1,070 cubic yards. (150' x 350' x 1.1' x 0.5 / 27 cf per yard = 1070 cu yd)]. Thus, the volume of water being repelled by Riffin's levee would be contained in this triangular wedge, and would not raise the surface water level upstream from Riffin's western

boundary line.

44. **Balance of hardships / public interest.** Essentially Riffin has several options: He could file suit against all the upper landowners for damages caused by the unlawful waters their properties cast upon Riffin's property; he could ask this court to enjoin those upper landowners from continuing to cast those unlawful waters onto his property, and / or ask this court to compel those property owners to install storm water management systems which would ameliorate those unlawful waters; or he could construct a levee which would repel those unlawful waters without causing any material injury to any other riparian land owner.

45. Building a levee is somewhat costly. Installing storm water management systems on those thousands of acres of heavily developed, residential, commercial and industrial lands which are discharging unlawful waters into Beaver Dam Run, would reduce the volume of those unlawful waters, and perhaps eliminate the flooding on Riffin's property. Unfortunately, it would cost many millions of dollars to retrofit all of those properties with storm water management systems. Given the choice of allowing Riffin to build a levee to repel the unlawful waters being cast upon his land, or using this court's resources to compel all those land owners to install storm water management systems, it would appear building a levee would be considerably less expensive, and would not sap this court's resources (or incur any political cost). Given the choices available, it would appear the public interest would be better served if Riffin were allowed to build his levee to repel those unlawful waters.

Interesting thought: Where would the trial be held if Riffin were to file suit against a thousand plus property owners? At the convention center? Where would all those reply briefs be stored? In *Jessup & Moore Paper Co. v. Zeitler, op. cit.*, at 399-400, the court held:

> "that two or more wrongdoers may be joined as defendants in a bill for injunction even though they have acted independently of each other in causing the injury complained of, provided that the injury was the result of their combined wrongful acts.
>
> In accordance with this general rule, it is held by the weight of authority that a riparian proprietor may maintain a suit against several upper proprietors to restrain them from polluting the stream by depositing refuse therein, where the acts of the defendants contributed

in creating the nuisance and producing the injurious result, even though the defendants were acting independently and not in concert or by unity of design. ... In *Woodyear v. Schaefer,* 57 Md. 1, 12, 40 Am. Rep. 419, ... this Court said of the complaintant's right to an injunction: "He will be entitled to the same relief against all the parties contributing to the injury, and as all are together contributing to the same result, *** he may be entitled to join in one case, all who still continue the injury; upon the principle *** that the acts of several persons, acting separately, and without concert and entirely independent of each other, may together constitute a nuisance, when the acts of either one alone would not create it, and such persons may be joined as defendants in a bill for an injunction."

In *Laird, Rock & Small, Inc. v. Harry T. Campbell,* 200 Md. 627, 632-633, 92 A.2d 380, 383 (1952), the court said:

"Whether additional water due to defendant's negligence contributed "materially" to the damage is not a question of percentage. In both respects the effect of defendant's negligence continued as long as the storm – and afterwards. The reasonable inference is that every drop in the cup contributed to the cup overflowing."

Respectfully submitted,

James Riffin d/b/a The Northern Central Railroad
Defendant